United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1633

DOCKET NO. 74-1633

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN RE

PENN CENTRAL COMMERCIAL
PAPER LITIGATION

ALEX SHULMAN,

Plaintiff-Appellee,

-against-

GOLDMAN, SACHS & CO., et al.,

Defendants-Appellees,

SEATTLE-FIRST NATIONAL BANK,

Applicant-Appellant.

BRIEF FOR DEFENDANT-APPELLEE GOLDMAN, SACHS & CO.

On Appeal from the United States District Court
for the Southern District of New York

[Appearances of Counsel are Listed on Next Page]

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BRIEF OF APPELLEE GOLDMAN, SACHS & CO.

COUNTER-STATEMENT OF ISSUES

Appellee Goldman, Sachs & Co. ("Goldman, Sachs") accepts appellant's statement of the first issue for consideration by this Court. With respect to the second and third issues stated, it is respectfully submitted that the question before this Court is not whether the District Court erred in denying appellant's motion, but whether that Court

abused its discretion in denying such motion. Subject to that modification, appellant's statement of the second and third issues is accepted as well.

COUNTER-STATEMENT OF THE CASE

Goldman, Sachs accepts appellant's statement of the case except that it takes issue with the characterization of the transaction whereby the commercial paper note in question was purchased. The undisputed evidence obtained in the course of discovery demonstrates that appellant Seattle-First National Bank ("Seattle"), acting as principal and not as agent, purchased the note from Goldman, Sachs and resold it to plaintiff Alex Shulman ("Shulman") at a profit.

As indicated hereafter, this role played by Seattle in the transaction is significant. The fact that Seattle bought and sold the note at a profit is an irrefutable demonstration that it has suffered no present loss and can state no claim for relief.

I. THE DISTRICT COURT CORRECTLY DENIED APPELLANT'S MOTION TO INTERVENE AS OF RIGHT

A. Seattle Has No Present Cause of Action Against Goldman, Sachs

By its "Proposed Intervention Complaint" (Appellant's Appendix at 16a), Seattle sought below to insert itself in the Shulman suit as a full-fledged plaintiff. Although it recited

that it sought relief on behalf of Shulman, Seattle asked specifically that the sale of the note to Seattle be rescinded or alternatively that Seattle receive money damages in the amount of the note purchased plus interest. Although the matter is somewhat obscured by Seattle's brief on appeal, the motion denied by the District Court was based specifically upon that pleading required by Rule 24(c), Federal Rules of Civil Procedure.

It is the position of Goldman, Sachs that Seattle's claimed "interest" in Shulman's suit against Goldman, Sachs, as set forth in the Proposed Intervention Complaint, is inadequate to justify Seattle's intervention as a plaintiff. If Seattle wishes to dispose of all litigation relating to the Commercial Paper note in question by a single law suit, it may intervene as a defendant in the Shulman case so that Shulman's claims against both Seattle and Goldman, Sachs may be litigated in a single forum at a single trial. If Seattle were to propose intervention in that manner, which would effectively eliminate the necessity for a separate law suit in the Western District of Washington, Goldman, Sachs would raise no objection. As long as Seattle seeks to intervene as a plaintiff, however,

we do object and submit that the District Court was correct in denying Seattle's motion.

Seattle's brief in this Court is conveniently vague as to the nature of the intervention it seeks and the nature of the legal issues and factual contentions the resolution of which require protection of Seattle's interests. The fact remains, however, that in the court below, Seattle sought to intervene by becoming a plaintiff. To become a plaintiff, however, it is necessary to state a cause of action; and this it has not done and cannot do because its claim is entirely contingent and conjectural.

Seattle bought and sold the commercial paper note in issue as principal. At the present time it owns no commercial paper; in its earlier sale of that paper it suffered no loss or economic injury. Having suffered no damage, it has no cause of action and, were it to become a plaintiff in this suit, it would be subject to dismissal from the action for failure to state a claim. See Mott v. Tri-Continental Financial Corporation, 330 F.2d 468, 470-71 (2d Cir. 1964).

Ignoring several of the cases cited in the District Court's opinion,* Seattle attempts to justify intervention

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* Seattle fails, for example, to mention Solien v. Miscellaneous Drivers & Helpers Union, 440 F.2d 124, 132 (8th Cir. 1971), cert. denied, 403 U.S. 905 (1971) ("Intervention as of right presupposes that the applicant has a right to maintain a claim for relief sought.")

despite its having no cause of action by reference to Trbovich v. United Mine Workers, 404 U.S. 528 (1972). In so doing, Seattle misconstrues the conclusion of the lower court which was merely that a direct and significant interest must be involved to justify intervention as of right:

> "The teaching of these cases is that an interest, to satisfy the requirements of Rule 24(a)(2), must be significant, must be direct rather than contingent, and must be based on a right which belongs to the proposed intervenor rather than to an existing party to the suit." (Appellant's Appendix at 94a)

The importance of demonstrating that Seattle has no cause of action, then, is in demonstrating that the interest asserted by Seattle in its pleading is insubstantial. In Trbovich, by contrast, the existence of an appropriate interest was admitted and the issue before the Court was one of adequacy of representation. That case, therefore, is not applicable to the situation before this Court which involves a non-party who seeks to intervene as a full-fledged plaintiff asserting its own cause of action against the defendant.

In this situation, the inability to state a claim is a fatal defect: whatever arguments may be made in favor of allowing some limited form of intervention for one not having a cause of action, it cannot be suggested that Rule 24(a) creates a cause of action where none otherwise exists. By arguing for intervention as a plaintiff, Seattle seeks to assert just this.

B. Seattle Has Identified No Other Interest Justifying Intervention

By its total failure to mention the Proposed Intervention Complaint, Seattle may intend to suggest that it now seeks some other form of intervention than that sought below. Apart from the fact that such a variation from its motion would not properly be before this Court, the limited "interests" discussed in Seattle's brief do not justify intervention of any kind involving alignment as a plaintiff:

1. Seattle asserts an interest in the disposition of certain legal issues involved in the Shulman litigation in New York (Shulman I) which may have stare decisis effect upon Shulman's case against Seattle in Washington (Shulman II). The section of Seattle's brief presenting this argument is most notable for the fact that it does not identify a single issue of law as to which this risk exists. There are, of course, many issues of law common to Shulman I and Shulman II. In fact, these issues are largely common to all of the Penn Central Commercial Paper cases which remain pending. It has not been suggested, however, that the plaintiff in each of those suits has the right to intervene in each of the other suits for the purpose of protecting its "right" to favorable legal precedent.

The case quoted at length by Seattle in its brief, Atlantis Development Corporation v. United States, 379 F.2d 818 (5th Cir. 1967), does not indicate that the mere

existence of common legal issues is a sufficient basis for intervention as of right. Atlantis instead presents a situation in which a proposed intervenor is "for all practical purposes shortly to be foreclosed" on certain issues as a result of the disposition of the action. Seattle, by contrast, has not identified a single legal issue as to which it will as a practical matter be foreclosed as a result of decisions in Shulman I. In the absence of concrete argument on this point, it is submitted that the decision of the lower Court that Seattle's interest in the legal issues was not sufficient to justify intervention should not be overturned.

2. Seattle also argues that it will have no opportunity to vindicate its reputation which it claims will be at stake in Shulman I. In support of this proposition it argues that the question of whether Seattle has committed fraud will be a necessary issue in the dispute between Shulman and Goldman, Sachs. The issue in that case, however, is whether Goldman, Sachs committed fraud. If Shulman wins that action the reputation which will suffer is that of Goldman, Sachs, not that of Seattle. If Shulman loses that action it is equally difficult to see how the reputation of Seattle will be significantly affected -- especially by a general jury verdict. Moreover, if Shulman loses and pursues his claim against Seattle, Seattle's opportunity to vindicate any inferred injury to its reputation will be immediately at hand.

If Shulman is interested in an even more prompt vindication and is confident of its position, it may of course adopt the suggestion of Goldman, Sachs and intervene as a party defendant, putting in issue the matters raised in the suit brought by Shulman against Seattle. It should also be noted that the risk of a legal determination which will adversely affect Seattle's position in Shulman II can be better protected by intervention as defendant. It is, after all, as a defendant that Seattle will confront Shulman in the Washington case, and it is logical to assume that it will be as a defendant that it can best articulate and defend its legal positions.

3. Seattle does have one obvious interest -- its desire and hope that Shulman will win its case against Goldman, Sachs, thereby mooting Shulman's case against Seattle. That interest, however, is absolutely identical to the interest that Shulman has in prosecuting his own claim against Goldman, Sachs, and to that extent Shulman represents Seattle's own interest.

The suit in which Seattle seeks intervention is not one for broad equitable relief affecting a variety of parties. Neither is it a suit where a public interest is at stake which requires additional representation. What is

involved here is a private suit for money damages or rescission of a note. It is a case in which the plaintiff is fully able to prosecute his claims in his own interest without the assistance of an intervenor and where the insertion of Seattle as a plaintiff without a true cause of action can only cause confusion and delay. By intervening as a defendant, on the other hand, Seattle could eliminate the necessity for a separate case in the Western District of Washington and thus achieve the appropriate ends of eliminating multiplicity of litigation and unnecessary expense to the parties and the courts.

II. THE DISTRICT COURT CORRECTLY DENIED SEATTLE'S MOTION FOR PERMISSIVE INTERVENTION

With respect to the denial of Seattle's application for permissive intervention, the issue before this Court is whether the District Court abused its discretion in denying said motion. E.g., Lipsette v. United States, 359 F.2d 956, 959 (2d Cir. 1966).

The thrust of Seattle's assignment of error with regard to denial of this branch of its motion is that the court did not focus sufficiently upon the issue of whether the proposed intervention would, in the words of Rule 24(b), "unduly delay or prejudice the adjudication of the rights of

the original parties." Although Rule 24 provides that these factors are to be considered by the District Court "[i]n exercising its discretion," nothing on the face of the Rule suggests, nor has Seattle cited any cases holding, that the quoted language is a restriction upon the Court's ability to exercise its discretion to find intervention undesirable for reasons other than prejudice or delay. In the Lipsette case, supra, for example, it was the risk of "trial confusion" which led the Court to deny intervention.

In the instant case the opinion of the District Court makes clear that its exercise of discretion was based upon a balancing of a variety of factors, including a consideration of inevitable delay and the minimal countervailing benefits to be obtained. The decision reflects careful consideration of the contingent nature of Seattle's claim and the delay inherent in the addition of another party which would only repeat arguments inevitably made by Shulman as well. In these circumstances it is apparent that the Court correctly exercised its discretion in denying permissive intervention.

III. THE COURT BELOW CORRECTLY DENIED SEATTLE'S MOTION FOR CONSOLIDATION

With respect to Seattle's motion to consolidate Shulman I and Shulman II, the court below held that it had no power to accomplish the consolidation of cases pending before it solely for purposes of pre-trial proceedings without first transferring such cases to itself for all purposes pursuant to the provisions of 28 U.S.C. § 1404(a). The Court further held -- and this latter holding is not challenged by Seattle's brief on appeal -- that a transfer of Shulman II from the Western District of Washington to the Southern District of New York was prohibited by the terms of 12 U.S.C. § 94 (1970) which provides that actions against a National Banking Association may be brought only "within the district in which such association may be established. . . ." Seattle apparently does not challenge the conclusion that a transfer for all purposes would be improper in light of that statutory provision, even on consent. Hoffman v. Blaski, 363 U.S. 335 (1960). It argues, however, that consolidation for trial may be effected regardless of whether or not a transfer is made or would be proper.

The consolidation thus contemplated by Seattle would -- assuming that it survived an order of remand by the Multidistrict Panel which might have the effect of undoing any consolidation not predicated upon a proper transfer for all purposes -- operate functionally as a prohibited change

of venue. The net result of the proposed consolidation would be to place Shulman II in the Southern District of New York for all purposes -- precisely the result prohibited by 12 U.S.C. § 94. The issue thus posed is not whether a consolidation is a pretrial proceeding within the meaning of 28 U.S.C. § 1407, as Seattle seems to suggest, but whether consolidation is proper in this case where the result will be to circumvent the clear intent of the National Banking Act venue provisions.

If Seattle's arguments were to prevail, the power of a transferee judge in a coordinated pretrial proceeding would not merely be equal to that of a transferor judge -- the desirable result reached in the cases cited by Seattle -- but would exceed it: the transferor judge of Shulman II has no power to effect a consolidation of his case with one pending in New York, nor even to lay the groundwork for such a consolidation by transfer. Only the fortuitous conjunction of these two cases for pretrial purposes has placed them both before a single judge. To allow that temporary situation to form the basis for a power not otherwise available to any one judge appears entirely inappropriate.

It is for this reason that Seattle's reliance upon Pfizer v. Lord, 447 F.2d 122 (2d Cir. 1971), is misplaced. This Court there held that a transferee judge had power, in a proper case, to transfer a case to himself for all purposes

pursuant to the provisions of 28 U.S.C. § 1404(a). In reaching that conclusion, this Court pointed out that if such power were not given to the transferee judge it would not be exercisable by any judge until remand, and thus a power ordinarily exercisable in the course of pretrial proceedings would be delayed in a manner inconsistent with the goals of Section 1407 to eliminate unnecessary duplication and inconvenience to parties and the Courts. The same rationale would apply to the motion for summary judgment which was held properly made to the transferee judge in Humphreys v. Tann, 487 F.2d 666, 667 (6th Cir. 1973), cert. denied, U.S. (1974). In the instant case, by contrast, Seattle would have the transferee judge exercise a power that the transferor judge never had and could not properly exercise. This proposed consolidation is thus based not on the inherent power of the transferee judge to do what might reasonably have been done by the transferor judge, but is rather an effort to expand the powers of the transferee judge beyond those that might properly be exercised in the transferor court -- and in the process circumventing a statutory provision clearly drafted to prevent trial other than in a National Bank's home district.

As the court below observed, our position is also supported by Rule 15(b) of the Rules of the Judicial Panel on Multidistrict Litigation which provide that each transferred

action not terminated in the transferee court will be remanded unless ordered transferred. That Rule clearly contemplates the orderly process of remand or transfer; and where transfer is improper only remand is appropriate.

CONCLUSION

The District Court correctly concluded that Seattle's proposed intervention as a plaintiff should not be granted either as of right or as a matter of the lower court's discretion. It further correctly concluded that it had no power to consolidate the two actions without first effecting the transfer which Seattle apparently concedes would not have been proper.

Accordingly, the order of the District Court denying Seattle's motions to intervene and alternatively to consolidate should be affirmed in all respects.

Respectfully submitted,

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The undersigned, an attorney duly admitted to practice in this court, hereby certifies that two copies of the within brief have been personally delivered to the attorneys whose offices are in The City of New York and by air mail to the office of Bogle, Gates, Dobrin, Wakefield & Long in Seattle, Washington.

Dated, January 27, 1975

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